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In The
Supreme Court of the United States

MARCEL WINDT and E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.; JOHN A. MCMASTER; JOSEPH P. NACCHIO; and ROBERT S. WOODRUFF,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE KINGDOM OF THE NETHERLANDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Interest of *Amicus Curiae*	1
Summary of Argument	2
Argument	3
The Lower Courts' Apparent Disregard of The Treaty Rights of Dutch Nationals Warrants This Court's Review.	3
Conclusion	5

TABLE OF AUTHORITIES

Page

Cases

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 4

Statutes

8 U.S.T. 2043 1

Other Authorities

U.S. Dep't of State, *Background Note: The Netherlands* (Oct. 2008), at http://www.state.gov/r/pa/ei/bgn/3204.htm 1

INTEREST OF *AMICUS CURIAE*[1]

In 1956, the Kingdom of the Netherlands entered into a Treaty of Friendship, Commerce and Navigation with the United States ("Treaty"), 8 U.S.T. 2043, in order to "strengthen[] the bonds of peace and friendship traditionally existing between them" and "encourag[e] closer economic and cultural relations." Among other things, the Treaty establishes "arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges." Treaty pmbl.

An enormous amount of trade is conducted under the auspices of the Treaty. The Netherlands is the fourth-largest direct foreign investor in the United States, with direct investments of $189 billion as of 2006. The United States is the third-largest direct foreign investor in the Netherlands, with direct investments of $216 billion as of 2006. *See* U.S. Dep't of State, *Background Note: The Netherlands* (Oct. 2008), at http://www.state.gov/r/pa/ei/bgn/3204.htm. The Netherlands is also the eighth-largest destination for U.S. exports, and more than 1,600 U.S. companies maintain subsidiaries or offices in the Netherlands. *Id.*

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[1] This brief is filed with the accompanying written consent of all parties. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

In light of these historic and extensive trading and investment ties, the Netherlands has a significant interest in ensuring that its nationals have appropriate and nondiscriminatory access to U.S. courts for the peaceful and impartial resolution of the commercial disputes that inevitably arise from extensive bilateral commerce. The Netherlands also has an overriding interest in ensuring that its Treaty with the United States is properly construed and honored.

SUMMARY OF ARGUMENT

As commerce becomes ever more global and cross-border transactions ever more prevalent, commercial parties increasingly depend on courts of justice to provide clear, fair, and efficient processes for resolving their disputes with parties from other countries. That is why the Treaty provides that nationals of the Netherlands and the United States are to receive "national treatment with respect to access to the courts" of the other nation.

In upholding dismissal of petitioners' lawsuit on *forum non conveniens* grounds, the opinions below suggest that the courts would have reached a different result if the plaintiffs had been U.S. nationals, whose choice of forum would have been afforded a high degree of deference even if all other facts and circumstances were the same. That differential treatment appears to conflict with the rights of Dutch nationals and the obligations of the United States under the Treaty, warranting this Court's review.

ARGUMENT

The Lower Courts' Apparent Disregard of The Treaty Rights of Dutch Nationals Warrants This Court's Review.

The Treaty requires "national treatment with respect to access to the courts" of each country. Yet, the court of appeals' opinion does not even mention the Treaty, and the district court asserted that there is no such treaty: "This Court is aware of no bilateral or multilateral Treaty of Peace, Friendship, Navigation and Commerce * * * granting the Netherlands nationals 'national treatment' for the purposes of access to this nation's courts." Pet. App. 57a n.14. The Netherlands respectfully suggests that this Court's review is required to ensure that U.S. courts recognize the Treaty and give effect to its "national treatment" mandate.

Article V, Section 1 of the Treaty states in relevant part:

> Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.

Accordingly, nationals of the Netherlands, including petitioners here, are entitled to "national treatment" --*i.e.*, to be treated as nationals of the United States —with respect to court access in the United States.

The court of appeals ruled that the district court correctly "accorded the foreign Trustees a low degree

of deference." App. 13a. It acknowledged that "[o]rdinarily, a strong presumption of convenience exists in favor of a domestic plaintiffs' chosen forum, and this presumption may be overcome only when the balance of the public and private interests clearly favors an alternate forum." *Id.* at 12a. However, it held that "'a foreign plaintiff's choice deserves less deference.'" *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981)). That conclusion appears inconsistent with the Treaty.

If a U.S. plaintiff filing suit against a U.S. defendant has a choice of international fora, and chooses to file suit in the U.S., that plaintiff would be entitled to a strong presumption in favor of his or her choice. Under the Treaty's national treatment mandate, a Dutch plaintiff should be entitled to the same presumption in those circumstances. Where the issue is the convenience of the U.S. as a forum, applying a different presumption to U.S. and foreign plaintiffs would not appear to be "national treatment." Indeed, under the approach of the courts below, a Dutch national would receive the same disfavored treatment as the national of a non-signatory country, thereby effectively voiding the Treaty's national treatment provision.

In this case, petitioners' right to bring suit should be even less subject to doubt than that of other Dutch nationals. Being court-appointed and subject to court supervision, the Trustees are effectively instruments of the Dutch judicial system. As such, their judgment regarding the relative convenience between United States and Dutch forums would be particularly well informed and entitled to deference

In sum, the Netherlands believes that the petition raises an important and recurring issue and requests that the Court clarify that treaty guarantees of national treatment with respect to court access should play a meaningful role in *forum non conveniens* analysis.

CONCLUSION

The Court should grant the petition to clarify the role of treaty provisions in the *forum non conveniens* framework.

Respectfully submitted,

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